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Westchester Capital Management, Inc and
Green & Smith Investment Management L.L.C.
[Additional Counsel on Signature Page]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HCL PARTNERS LIMITED PARTNERSHIP, On behalf of Itself and all others similarly situated,

Plaintiff,

-v-

LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, DEAN M. LUVISA, AMIN I. KHALIFA and PRICEWATERHOUSECOOPERS, LLP,

Defendants.

Case No.: 07-cv-2245-BTM-NLS

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF CLASS MEMBERS WESTCHESTER CAPITAL MANAGEMENT, INC. AND GREEN & SMITH INVESTMENT MANAGEMENT L.L.C. FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF LEAD PLAINTIFF'S SELECTION OF LEAD COUNSEL

DATE: TBD
TIME: TBD
JUDGE: Hon. Barry Ted Moskowitz
CTRM: 15 (5th Floor)

FRANK CHAREK, Individually and on behalf of all others similarly situated,

Plaintiff,

-v-

LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA,

Defendants.

Case No.: 07-cv-2256-BTM-NLS

[Caption continued on next page]

DEVAY CAMPBELL, Individually and on behalf of all others similarly situated, Plaintiff, -v- LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA, Defendants.	Case No.: 07-cv-2297-BTM-NLS

I. INTRODUCTION

Westchester Capital Management, Inc. ("Westchester Capital") and Green & Smith Investment Management L.L.C. ("G&S") (collectively, "Movants") respectfully submit this memorandum pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the "Exchange Act"), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), in support of their motion for entry of an order consolidating all of the above captioned actions, appointing them as the Lead Plaintiff in the consolidated action, and appointing Lead Plaintiff's choice of counsel as Lead Counsel for the Class.

Movants are Advisers to and have full authority to act for five investment funds that collectively have suffered losses of approximately $7.5 million resulting from LEAP Wireless International Inc.'s ("LEAP" or the "Company") fraudulent reporting of revenues and income and the resulting artificial inflation of LEAP's stock price. Movants believe that the funds that they control have suffered the largest losses of any potential plaintiff moving to be appointed lead plaintiff for the consolidated action. Movants are familiar with the applicable provisions governing the appointment of the lead plaintiff in securities class actions, understand their responsibilities to the class, and are willing and able to oversee the prosecution of this action.

In light of the size of the financial losses of their funds, Movants believe that they have the largest financial interest in the relief sought by the class as currently defined in the complaints filed. Movants will ensure that the litigation is conducted in the best interests of the members of the class and are not subject to any unique defenses that would render them incapable of adequately representing the class. Therefore, Movants respectfully request that the Court consolidate all related actions, grant Movants' motion to be appointed lead plaintiff, and approve their selection of Lead and Liaison Counsel.

II. FACTUAL BACKGROUND

The three actions filed to date are federal class actions brought on behalf of all persons or entities who purchased the securities of LEAP during the period from May 16, 2004 to

November 9, 2007 (the "Class Period")[1], pursuing remedies under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. LEAP, traded on the NASDAQ national market system under the symbol "LEAP," is a wireless telecommunications carrier operating in U.S. markets. A Delaware corporation headquartered in San Diego, California, LEAP provides services through two brands, Jump Mobile and Cricket, both offered by LEAP's wholly owned subsidiary, Cricket Communications, Inc. As of January 15, 2008, LEAP had approximately 68,210,000 shares of common stock outstanding.

On November 9, 2007, just weeks after rejecting a premium buyout offer from one of its competitors, LEAP announced that it would restate its financial statements for the fiscal years 2004, 2005, 2006, and the first and second quarters of fiscal 2007 to correct accounting errors in previously reported statements of operating expenses and, in particular, service and equipment revenues. These misstatements dealt primarily with the misreporting of revenues mistakenly derived from customers who had voluntarily disconnected their wireless service. The announcement of the restatement was especially significant due to its temporal proximity to a takeover bid from a rival wireless provider at $69 per share and the resignation in September 2007 of LEAP's Chief Financial Officer and a LEAP director. In the various complaints filed, plaintiffs have alleged that LEAP management carried out a scheme and course of conduct to overstate revenues and understate expenses that was intended throughout the Class Period to defraud investors by artificially inflating the value of the Company's stock. Following LEAP's November 9, 2007 announcement of the restatement, the market responded by driving the Company's stock price down 37% in a single day's trading, well below the $69 per share offer and well below its trading levels over the prior years.[2]

The actions that have been filed allege that defendants knowingly or recklessly issued materially false and misleading statements that misrepresented and failed to disclose that the Company had been misreporting revenues from customers who had voluntarily disconnected service, that LEAP had over-reported operating income based on the misreported service revenues and other accounting errors, and that defendants' positive statements about the Company's earnings and prospects were lacking in a reasonable basis at all relevant times.

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[1] This is the longest of the class periods asserted in the three actions filed. Any differences in the class periods selected will be eliminated through the filing of a consolidated amended complaint.

[2] LEAP's stock price fell from $58.10 per share on November 8, 2007 to close at $36.72 per share on November 9 on extremely heavy volume of over eleven million shares, more than six times the previous day's volume.

III. THE RELATED ACTIONS SHOULD BE CONSOLIDATED

Section 21D(a)(3)(B)(ii) of the Exchange Act addresses the issue of consolidation of similar actions filed under the PSLRA:

> If more than one action on behalf of a class asserting substantially the same claim or claims arising under this title has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination [of appointment of lead plaintiff under § 21D(a)(3)(B)(I)] until after the decision on the motion to consolidate is rendered.

15 U.S.C. § 78u 4(a)(3)(B)(ii).

Accordingly, a two-step process is often utilized to determine lead plaintiff and lead counsel status when consolidation is an issue. First, the Court rules on the consolidation issue. Second, after the cases have been consolidated, the Court rules on the lead plaintiff and lead counsel issues.

Movants therefore request that the Court consolidate the related actions captioned above and then rule on the lead plaintiff and lead counsel issues in this matter. Under Federal Rule of Civil Procedure 42(a), a timely determination pertaining to consolidation is reasonable and will ultimately benefit the class members' interest in the prompt prosecution of their claims.

There are at least three other actions pending in this Court, each of which is captioned above. Movants believe that consolidation of these separate yet related actions is appropriate because they involve common questions of law and fact and allege the same or similar claims under the federal securities laws on behalf of the same or similar plaintiff class. In addition, all actions will present similar issues regarding class certification, and will undoubtedly necessitate identical discovery of the parties and of non-parties. There is also no reason to believe that defendants would not support consolidation of these actions, as well as any subsequently filed related actions. Accordingly, these actions should be consolidated for all purposes in the interests of judicial economy and overall efficiency. *Richardson v. TVIA, Inc.*, No. C-06-06304-RMW, 2007 U.S. Dist. LEXIS 28406 (N.D. Cal. Apr. 16, 2007) (holding that the Court may consolidate actions involving a common question of law or fact); *Ruland v. Infosonics Corp.*, Case No. 06-cv-1231-BTM (WMc), 2006 U.S. Dist. LEXIS 79144 (S.D. Cal. Oct. 23, 2006) (stating that where the actions involve the same time frame, arise from the same facts, and allege violations of the same securities laws, the cases should be consolidated); *Plumbers & Pipefitters Local 51 Pension Fund v. Petco Animal Supplies, Inc.*, Case. No. 05-cv-823 H (RBB), 2005 U.S. Dist. LEXIS 45908 (S.D. Cal. Aug. 16, 2005) (stating that the Court may order consolidation to avoid unnecessary cost or delay).

IV. PROPOSED LEAD PLAINTIFF SHOULD BE APPOINTED AS THE LEAD PLAINTIFF

A. The Procedure Mandated by the PSLRA

Section 21D of the Exchange Act, as amended by the PSLRA, sets forth the procedure for the selection of Lead Plaintiff to oversee class actions brought under the federal securities laws. Specifically, § 21D(a)(3)(A)(i) provides that within 20 days after the date on which the first class action is filed under the PSLRA, the plaintiff shall cause to be published, in a widely circulated national business oriented publication or wire service, a notice informing class members of the action and their right to file a motion for the appointment of lead plaintiff.

The PSLRA provides that within 60 days after the publication of the notice, any person or group of persons who are members of the proposed class may apply to the court to be appointed Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). Section 21D(a)(3)(B) of the Exchange Act directs the Court to consider any motions by a plaintiff or purported class members to serve as Lead Plaintiff in response to any such notice by not later than 90 days after the date of publication pursuant to § 21D, or as soon as practicable after the Court decides any pending motion to consolidate any actions asserting substantially the same claim or claims. Under this section the Court shall consider any motion made by a class member and shall appoint as lead plaintiff the member or members that the Court determines to be most capable of adequately representing the interests of class members.

In determining the "most adequate plaintiff" the PSLRA provides that:

> [T]he Court shall adopt a presumption that the most adequate plaintiff in any private action arising under this title . . . is the person or group of persons that –
>
> (aa) has either filed the complaint or made a motion in response to a notice . . .;
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

§ 21D(a)(3)(B)(iii)(I); 15 U.S.C. § 78u 4(a)(3)(B)(iii)(I).

B. Movants Satisfy the Provisions of the PSLRA and Should be Named Lead Plaintiff

1. Movants Have Complied with the PSLRA

The first complaint filed against defendants was *HCL Partners Limited Partnership v. Leap Wireless International, Inc., et al.*, 3:07-cv-02245-BTM-NLS, alleging a class period of January 7, 2005 through November 9, 2007. A notice pursuant to the PSLRA was published on November 27, 2007 over the Market Wire. The notice informed potential class members of the pendency of the action and their right to move to be appointed lead plaintiff and to designate their choice of lead counsel within 60 days. Accordingly, pursuant to the PSLRA, all motions for lead plaintiff must be filed no later than January 28, 2008. Movants have timely moved this Court to be appointed as the Lead Plaintiff on behalf of all members of the class.

Westchester Capital and G&S are related investment managers with full discretion and control over all investments made by the funds for which they act as Advisers. The Chief Compliance Officer of the Movants has full authority to take all actions on behalf of the Movants and the funds they advise, including the right to commence legal action and the right to seek to be appointed as a Lead Plaintiff. The Chief Compliance Officer, acting within his authority of behalf of the funds, duly signed a certification stating that he had reviewed a complaint in this action, and is willing to serve as the representative party on behalf of the class. The certification demonstrates that the funds advised by the Movants have suffered losses in the amount of $7,452,997.14 in connection with their purchases of LEAP stock, using either the "FIFO" or "LIFO" method of calculating losses.

2. Movants Have the Largest Financial Interest at Stake

The certification signed on behalf of the Movants demonstrates that during the Class Period, Movants purchased LEAP common stock in five funds that they manage at prices artificially inflated by defendants' false and misleading statements and have suffered losses approaching $7.5 million. To the best of the knowledge of the Movants and their counsel, Movants have the largest financial interest in the relief sought by the Class and, therefore, are presumptively the most adequate plaintiff pursuant to the PSLRA. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

3. Movants Otherwise Satisfy FRCP Rule 23

In addition to possessing the largest financial interest in the outcome of the litigation, the PSLRA provides that a Lead Plaintiff must also "otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). With respect to the qualifications of the class representative, Rule 23(a) requires that the claims be typical of the claims of the class and that the representative will fairly and adequately protect the interests of the class. *In re Surebeam Corp. Sec. Litig.*, Case No. 03-cv-1721-JM (POR), 2003 U.S. Dist. LEXIS 25022, (S.D. Cal. Dec. 30, 2004) (a presumptive lead plaintiff must make only a preliminary showing of typicality and adequacy). As detailed below, Movants satisfy the typicality and adequacy requirements of Rule 23(a).

a. Movants' Claims Are Typical of the Claims of the Members of the Class

Typicality exists when a proposed lead plaintiff's claims arise from the same conduct from which other plaintiffs' claims and injuries arise. Possible factual distinctions between plaintiffs' claims do not vitiate typicality, as the same legal theory may control even in the face of differences in fact. *Richardson,* 2007 U.S. Dist. LEXIS 28406, at *6 ("The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' *Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. 1992)."); *Ruland*, 2006 U.S. Dist. LEXIS 79144, at *17 ("Claims are 'typical' under Rule 23 if they are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.' *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998)."); *Plumbers & Pipefitters*, 2005 U.S. Dist. LEXIS 45908 (holding that when a plaintiffs' complaint is premised on the same legal and factual allegations as other plaintiffs, it passes the Rule 23(a) test for typicality).

The questions of law and fact here, which predominate over questions that may affect individual claims, include: (a) whether the federal securities laws were violated by defendants' acts; (b) whether defendants' statements during the Class Period omitted and/or misrepresented material facts; (c) whether the defendants acted intentionally or recklessly; (d) whether the market price of LEAP shares was artificially inflated due to the activities complained of; and (e) the extent of damages class members sustained and the appropriate measure of those damages. The typicality requirement is satisfied here because the claims to be asserted by Movants are based on the same legal theory and arise from the same event or practice or course of conduct that gives rise to the claims of the class members.

b. Movants Will Fairly and Adequately Represent the Interests of the Class

The adequacy of representation requirement of Rule 23 is satisfied where it is established that a representative party "will fairly and adequately protect the interests in the class." Accordingly, the test for lead plaintiff adequacy is:

> Adequacy of representation under Rule 23 contains two factors: "1) that the representative party's attorney be qualified, experienced and generally able to conduct the litigation; and 2) that the suit not be collusive and plaintiff's interests not be antagonistic to those of the remainder of the class." *In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig*., 122 F.R.D. 251, 257 (C.D. Cal. 1998) . . . .

Surebeam Corp., 2003 U.S. Dist. LEXIS 25022, at *16.

The interests of Movants are clearly aligned with the interests of the members of the proposed class. There is no evidence of any antagonism between Movants and the proposed class members. As detailed above, the claims to be asserted by Movants present similar questions of law and fact as do the claims of the members of the proposed class. Their claims are typical of the claims of the members of the class, and they already have taken steps to advance this litigation. In addition, they have amply demonstrated their adequacy to serve as class representatives by signing a certification affirming their willingness to serve as and assume the responsibilities of class representatives. Westchester Capital has previously demonstrated its understanding of its responsibilities as a Lead Plaintiff and its willingness to assume those responsibilities through its role as the court-appointed lead plaintiff in a securities class action currently pending in the United States District Court for the Southern District of New York. *In re Imax Corp. Sec. Litig.*, Case No. 06 CIV 6128 (NRB)(S.D.N.Y).

Finally, Movants have selected and retained counsel highly experienced in prosecuting securities class actions such as this to represent them. For these reasons, Movants should be appointed Lead Plaintiff in the consolidated action.

V. THE COURT SHOULD APPROVE LEAD PLAINTIFF'S CHOICE OF COUNSEL

The PSLRA vests authority in the Lead Plaintiff to select and retain Lead Counsel, subject to court approval. *See* § 21D(a)(3)(B)(v). Movants have chosen Abbey Spanier Rodd & Abrams, LLP ("Abbey Spanier") to serve as Lead Counsel and the San Diego law firm of Hulett Harper Stewart LLP ("HHS") to serve as California Liaison Counsel. These firms have extensive experience in the area of securities litigation and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors.

VI. CONCLUSION

For the foregoing reasons, Movants respectfully requests that the Court: (i) consolidate the related Actions; (ii) appoint Movants Westchester Capital and G&S as the Lead Plaintiff in the consolidated action; and (iii) approve Lead Plaintiff's choice of Abbey Spanier to serve as Lead Counsel and HHS to serve as Liaison Counsel.

DATED: January 28, 2008

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